No. 15,510

United States Court of Appeals

For the Ninth Circuit

FIDALGO ISLAND PACKING COMPANY, a Corporation, and CLARA WILSON, Intervenor,
Appellants,

vs.

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,
Appellee.

Appeal from the District Court for the District of Alaska, Division Number One.

BRIEF FOR APPELLANTS.

FAULKNER, BANFIELD & BOOCHEVER,
JOHN H. DIMOND,
H. L. FAULKNER,
P. O. Box 1121, Juneau, Alaska,
Attorneys for Appellants.

Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

Texts

No. 15,510

United States Court of Appeals
For the Ninth Circuit

FIDALGO ISLAND PACKING COMPANY, a Corporation, and CLARA WILSON, Intervenor,
Appellants,

vs.

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,
Appellee.

Appeal from the District Court for the District of Alaska, Division Number One.

BRIEF FOR APPELLANTS.

JURISDICTION.

This is an action on an application of appellants in the District Court for the District of Alaska, Division Number One, for interest and attorneys' fees on a judgment in the case of Fidalgo Island Packing Company, plaintiff, and Clara Wilson, Intervenor, v. A. B. Phillips, Executive Director, Employment Security Commission of Alaska. The District Court on January 21, 1957, on this application, which was actually an application for the reinstatement of the judgment on the mandate with certain modifications, held that interest could not be recovered on the amounts in-

volved in the above mentioned case, but awarded an attorneys' fee of 3% of the amounts of the claims involved in the case to be paid out of the claims under the salvage doctrine (R. 11-18). On rehearing the District Court reversed its order of March 14, 1957, and held that neither interest nor attorneys' fees could be recovered (R. 28-33).

An appeal was taken on April 2, 1957, by filing with the District Court a notice of appeal (R. 37). The jurisdiction of the District Court rests upon the Act of June 6, 1900, 31 Stat. 322, as amended; 48 U.S.C.A. sec. 101 and the jurisdiction of this Court on section 1291 of the New Federal Judicial Code.

STATEMENT AND HISTORY OF THE CASE.

The issues before this Court at this time are fairly simple and they concern only the allowance of attorneys' fees and interest in connection with the judgment already obtained, but in order to assist the court, we think a brief outline of the history of the case may be helpful.

This case was before this Court on the merits in 1955 (see printed record, Cause No. 14,505). It has been stipulated that the printed record in that case may be referred to by both parties on this appeal and may be used by this Court wherever necessary (R. 37-8).

The District Court for the First Judicial Division of Alaska had on May 12, 1954, entered a judgment in

Case No. 14,505 in favor of appellants (120 Fed.Supp. 777). The action was brought to enjoin the enforcement of a pretended regulation made by the Executive Director of the Alaska Employment Security Commission. The court in its opinion and judgment held the regulation to be void and as a result of that, certain payments which had been denied to claimants, who were employees of salmon canneries in Alaska, became due for unemployment compensation in the sum of $509,000 (R. 26). There are 2350 claimants, 18,000 separate claims, and these total the sum of $509,000.

The appellee in this case, who was the appellant in Case No. 14,505, appealed to this Court and the judgment of the District Court was affirmed on September 13, 1955 (230 Fed.2d 638). Thereafter the above named appellee, who was then the appellant, filed a petition for rehearing which was denied by this Court on June 21, 1956 (238 Fed.2d 234). Then the appellee herein applied to the Supreme Court of the United States for certiorari and this was denied on December 10, 1956 (77 Supreme Court Reporter, 262, Advance Sheets). The record in the District Court and in this Court in Cause No. 14,505, pages 3-17, inclusive, will show that the action was brought by plaintiff and intervenor on their own behalf and in behalf of all others in Alaska engaged in packing salmon, employers and employees, to enjoin the enforcement of this void regulation hereinafter mentioned, which was made in June, 1953, by the Acting Director of the Alaska Employment Security Commission.

That pretended regulation, if valid, would have deprived all employees in the salmon canning industry of the unemployment compensation benefits to which they were entitled under the law, in the sum hereinabove mentioned, namely, $509,000. Both plaintiff and intervenor alleged and proved and the court found irreparable damage would result if the enforcement of the regulation were not enjoined. The permanent injunction of the District Court is found in the printed record in Case No. 14,505 at page 65.

After this Court had affirmed the judgment of the District Court (230 Fed.2d 638) and had on June 21, 1956, denied a rehearing, a judgment on the mandate was entered by the District Court at Juneau on August 13, 1956. Counsel for the Employment Security Commission prior to the entry of this judgment on the mandate had announced his intention of applying to the United States Supreme Court for certiorari. On September 18, 1956, on application of the appellee herein, the District Court entered an order staying execution on the judgment pending the Supreme Court's decision on the petition for certiorari (R. 7-8).

When the appeal was taken in 1954 from the decision of the District Court granting the permanent injunction, this appellee applied for leave to appeal without a supersede as bond. The trial court did not grant this request, and then by stipulation the sum of $650,000, which was in the custody of the Treasurer of the United States to the credit of the Employment Security Commission of Alaska, was impounded pend-

ing the final outcome of the case and in order to protect the claimants in the payment of their claims pursuant to the lower court's judgment in case it were affirmed by this Court (pages 72-75, Printed Record in Case No. 14,505). These funds are still impounded (R. 43-4).

After the Supreme Court had denied certiorari in December, 1956, the appellants herein, plaintiff and intervenor, applied on January 7, 1957, to the District Court for reinstatement of the judgment on the mandate with an addition thereto allowing attorneys' fees and interest on the claims (R. 9-11). The application was made by presentation of a proposed form of judgment and on oral stipulation as to time and procedure. The matter was heard before the District Court at Juneau on January 18, 1957 (R. 11, 39).

On January 21, 1957, the District Court rendered an opinion in which interest was denied to the claimants and an attorneys' fee was ordered to be paid out of the impounded funds and deducted from the several claims of the claimants at the rate of 3% (R. 11-18). Thereafter on January 31, 1957, the appellants filed a notice of proposed order reinstating the judgment on the mandate and allowing the attorneys' fees as ordered by the court in its opinion of January 21, 1957. To this notice was attached a form of order (R. 19-22). Before anything was done with this order and on February 12, 1957, appellee herein filed a petition for rehearing and the court thereupon set the motion for the rehearing for argument on February 21, 1957 (R. 22-25).

On March 14, 1957, the District Court rendered another opinion in which the first opinion, that of January 21, was reversed as to attorneys' fees and the fee was denied (R. 28-33). Then on March 19, 1957, the court signed and entered an order reinstating the judgment on the mandate, which specifically states that no interest or attorneys' fees may be allowed (R. 34-36). The Commission has handled the defense to this case from the beginning and has considered itself the real party in interest. It has prosecuted all the appeals.

QUESTIONS PRESENTED.

This case does not present a question of whether the District Court had rightfully or wrongfully exercised its discretion. The court in its opinion of January 21, 1957, while placing a very modest value on the attorneys' services, considering the work involved and the considerable expense which was paid by plaintiff and intervenor, did recognize that an attorneys' fee should be paid. If the court had exercised its discretion and held that notwithstanding the record and the vast amount of work done and expense paid, the attorneys were not entitled to any remuneration or reimbursement, this Court might not want to disturb the final judgment unless it found that there was an abuse of discretion. We do not think there was any abuse of discretion in the case, because what the District Court held was, regardless of the work done and expense incurred, he could not allow any fee or interest because of the statutes of Alaska which will be herein-

after discussed. Therefore, briefly stated, the two questions presented are:

1. Whether the District Court erred in denying interest on claimants' claims from the time they became payable, and

2. Whether the District Court in its second opinion dated March 14, 1957, erred in denying attorneys' fees which include expenses of litigation and which appellants claim should have been allowed either under the salvage doctrine or under the provisions of section 762 or 814, Chapter 5, Ex. Sess., Laws of Alaska, 1955.

SPECIFICATIONS OF ERROR.

The District Court erred:

1. In denying interest to the claimants as proposed in the order of plaintiff and intervenor presented to the court and dated January 7, 1957.

2. In denying interest to the claimants in the above entitled cause as set forth in the opinion of the court of January 21, 1957.

3. In the opinion of March 14, 1957, in denying interest to claimants and in denying attorneys' fees to appellants either under the salvage doctrine as discussed in the court's first opinion of January 21, 1957 or from the administrative fund of defendant and the Employment Security Commission of Alaska by holding that the plaintiff was not a claimant.

4. In refusing to allow interest or attorneys' fees in the order reinstating the judgment on the mandate, which order is dated and filed March 19, 1957.

SUMMARY OF ARGUMENT.

I.

The District Court erred in refusing in its opinions of January 21 and March 14, 1957, to allow claimants interest on their claims during the period payment was withheld (R. 11, 28, 34). The error consists in the holding that this is in effect a suit against the Territory, and that the Territory, in the absence of a statute providing for interest, is, by reason of its sovereign immunity, exempt from payment of interest.

This is error for two reasons: first, it is not a suit against the Territory since the Territory gets neither advantage nor disadvantage from the litigation. The only parties interested or affected are employers and employees, and all claimants on whose behalf the action was brought; and second, even if the Territory were a party, as was said by this Court in *Mullaney v. Hess,* 189 Fed.2d 417 at 420-1, in dealing with interest from the Territory of Alaska on tax refunds:

> "We think that the weight of authority is that interest is recoverable on tax refunds in the absence of express statutory authority therefor."

II.

The court erred in its second opinion of March 14, 1957, in reversing the opinion of January 21, 1957, and holding that attorneys' fees including expenses of litigation could not be allowed either under the salvage doctrine, because of the provisions of Section 763, Ch. 5, Extraordinary Session Laws of Alaska 1955, or under the provisions of Sections 762 or 814 of the same statute.

The court's conclusion that the salvage doctrine did not apply seems to be contrary to the decision of the U.S. Supreme Court in *Sprague v. Ticonic National Bank,* 307 U.S. 161, and the Alaska statute cited by the court, i.e., Section 763, Ch. 5, Ex. Session Laws 1955, does not affect the allowance of attorneys' fees and expenses under the circumstances here, to be deducted from the claims, and there is nothing in that statute which would make the *Sprague* case inapplicable.

The court's failure to apply Sections 762 and 814, Ch. 5, Ex. Session Laws 1955, is based on the statement in the Opinion of March 14 (R. 29) that plaintiff is not a claimant within the meaning of those statutes. However, this is a class suit and it was brought on behalf of all claimants. It is true that plaintiff was not a claimant to benefits, but the intervenor was, and all other claimants were joined as plaintiffs.

III.

The court erred in entering the judgment of March 19, 1957, insofar as it denied interest and attorneys' fees (R. 34-36).

IV.

The defendant has no interest in the question of allowance of attorneys' fees, under the salvage doctrine, from the amounts due claimants. This is for the reason that it does not affect the total amount which they must pay from the impounded funds. They must, in any event, pay the full amount of the claims,

whether it is 97% to the claimants and 3% to plaintiff and intervenor as attorneys' fees, or 100% to the claimants. Only the claimants are affected by this, and it is significant that none of them has at any time raised any objections. (See Rule 71 F.R.C.P.)

V.

If interest is allowed on the claims, from the time they became due, and the court could, for any reason, hold that attorneys' fees are not payable from the claims themselves, they should be deducted from the interest. Emphasis herein is ours.

ARGUMENT.

(1) INTEREST.

Judge Kelly, in the opinion of the District Court of January 21, 1957 (R. 11-18) sets forth briefly the chronology of the pertinent proceedings in this long drawn out case. In fairness to him we must state that he gave the questions presented to him careful and painstaking consideration, although we cannot agree with his conclusions. The printed record in Cause 14,505 and the files of this Court show that defendant took the full time allowed by law and the Rules, to appeal, to apply for rehearing, and to file petition for certiorari. During all the time required to get a final adjudication, the payment of claimants' compensation has been delayed. It is now almost 3 years since Judge Folta held, on May 7, 1954, that the Reg-

ulation of Defendant, which would have deprived them of their claims, was invalid, thereby establishing these claims and opening the door to their payment.

The funds for payment of the claims were impounded by order of the District Court of June 25, 1954. Under the law all Employment Security funds are kept in the Treasury of the United States and drawn out from time to time on requisition of the Employment Security Commission. The United States uses these funds and pays interest on them (Sec. 1104, Title 42, U.S.C.A. pocket part). The amounts on deposit are averaged monthly and the rate is fixed at the average rate paid by the United States on its obligations. We do not know just how much interest was credited by the Treasurer to the impounded funds, but at even as little as 2%, it would be over $10,000 a year. The defendant and the Commission must have received this by reason of holding off so long from paying any part of the claims. It would seem to be a case of unjust enrichment, and the Commission gained this considerable sum of interest at the expense of claimants, for they were entitled to receive their claims in May, 1954.

It may be contended that this has no bearing on the asserted legal right of claimants to interest on their claims but this case is before a court of equity and it should be considered in applying that "consideration of fairness" this Court found to have been recommended by the Supreme Court of the United States in *Jackson County v. United States,* 308 U.S. 343, 352, as cited in *Mullaney v. Hess* (189 Fed.2d 417, 420-1).

The Alaska statute on interest is Sec. 25-1-1 A.C.L.A. 1949, which reads:

> "*Legal Rate Of Interest.* The rate of interest in the Territory of Alaska shall be six per cent per annum, and no more, on all moneys after the same become due; on judgments and decrees for the payment of money: . . . on money received to the use of another and retained beyond a reasonable time without the owner's consent express or implied, or on money due upon the settlement of matured accounts from the day the balance is ascertained."

The $509,000 which is now payable to the 2350 claimants, and which became payable on May 12, 1954, is payable on account of a "judgment or decree for the payment of money". It is true that where an employer has overpaid his contributions to the Unemployment fund, he is entitled to a refund "without interest" (Sec. 51-5-14(f), A.C.L.A. 1949; Sec. 518, Ch. 5, Ex. Session Laws 1955), but there is no prohibition against interest on unpaid and withheld claims for benefits due employees. By allowing no interest to employers under Sec. 51-5-14(f), dealing with refunds, and again imposing 10% interest on employers for delayed payment of contributions under Sec. 51-5-14 A.C.L.A. 1949 and 8% under Sec. 511, Ch. 5, Ex. Session Laws 1955, and remaining silent about interest on overdue benefits to employees, it follows that the Legislature did not intend to deprive claimants of interest.

It seems clear, therefore, that Sec. 25-1-1 A.C.L.A. 1949, is applicable on the matter of interest in this case.

However, the court based its opinion of January 21 (R. 11-18) denying interest, and its judgment of March 19, 1957 (R. 34-36) not on the inapplicability of the statutes above mentioned in other cases, but on the belief that the Territory was the real party defendant and on account of its sovereignty, no interest could be awarded claimants. Even if the Territory could have been considered the real party in interest, so it was in *Mullaney v. Hess* (189 Fed.2d 417, 420-1, *supra*) in which this Court held that in the absence of a statute to the contrary, interest might be recovered on tax refunds.

In that case the Tax Commissioner was the defendant named; in this case it is the Executive Director of the Employment Security Commission. In the *Hess* case we were dealing with refund of taxes to be paid under protest and probable action to recover. In this case we are dealing with Unemployment benefits long past due the claimants. While the amount now fixed at $509,000 is a little more than that computed at the time of trial in May, 1954, the claims were due at that time. (See pp. 189-90 printed record in Cause No. 14,505.) Surely if interest can be recovered from the Tax Commissioner on a tax refund it ought to be recoverable on these claims for Unemployment benefits.

The Territory, however, is not the defendant, or the real party in interest. The Territory cannot, and could not at any time, have derived any benefit if the action of plaintiff and intervenor had gone against them. Conversely, it loses nothing by the decisions of

the courts against defendant. It can make no difference to the Territory whether the Court now allows interest and attorneys' fees or denies them.

In the case of *Sheldon et al. v. Griffin,* 174 Fed.2d 382, 383, this Court had for consideration an attack on an amendment to the Alaska Unemployment Law, now renamed the Alaska Employment Security Act. The action was brought by Griffin who alleged he was a citizen and taxpayer. This Court, in an opinion by Judges Healy, Mathews and Pope, said:

> "In his complaint the plaintiff alleged merely that he was a citizen and taxpayer of Alaska. While he offered no proof on the subject we may assume that he occupies that status. The amendment under attack adds nothing to the burden of taxpayers of Alaska. The Unemployment Compensation fund administered by the Commission is made up of contributions exacted from employers in accordance with regulations prescribed by the Commission, plus fines and penalties collected pursuant to the provisions of the Act. . . ."

If the Territory were a party to this suit it would have been entitled to prosecute its various appeals without a supersedeas bond. Sec. 55-11-6 A.C.L.A. 1949, reads:

> "In all actions or proceedings in any court in which the Territory of Alaska is a party, or in which it is interested, it shall not be required to furnish any bond or undertaking upon appeal or otherwise in any such action or proceeding."

However, when application was made by defendant for that purpose, it was denied and the funds sufficient to pay all claims were impounded.

In the case of *New England Fish Co. v. Vaara and Employment Security Commission of Alaska,* 98 Fed. Supp. 492, there was also an application to the court for leave to appeal without supersedeas bond. The trial court denied the application and ordered funds impounded, pending appeal. Then the case was appealed and an application was made to this Court to release the impounded funds, urging the application of Sec. 55-11-6 *supra,* among other grounds. This Court denied the application. (See record in Cause No. 12,872.)

The Territory of Alaska is not concerned, or interested, within the meaning of the statute, in any phase of this litigation.

Section 1001, Ch. 5, Ex. Session Laws 1955, which is substantially the same as Sec. 51-5-19, A.C.L.A. 1949, reads:

> "*Non Liability Of Territory.* Benefits shall be deemed due and payable under this Act only to the extent provided in this Act and to the extent that moneys are available therefor to the credit of the Unemployment fund, and the liability of the Territory and the Commission shall be limited accordingly."

In other words the payment of contributions is the responsibility of employers, and the receipt of benefits by the unemployed depends on the contributions and nothing else. It is quite different from those cases where the Territory levies a general tax for territorial purposes.

The U.S. Supreme Court has held that under similar circumstances as here, interest should be allowed

(see *Ticonic National Bank v. Sprague,* 303 U.S. 406), although that case did not concern a state or territory. Nor does this case.

---

(2) ATTORNEYS' FEES.

(A) Fees May Be Allowed Under Salvage Doctrine.

The District Court, in its opinion of January 21, 1957 (R. 11-18) allowed an attorneys' fee of 3% of the amount of the claims to cover the services of the attorneys employed by plaintiff and intervenor, and the expenses of travel, printing briefs, etc. This was under the "salvage" doctrine. In the opinion of March 14 the court, on reconsideration, reversed itself and denied fees and expenses (R. 28-33).

We think the opinion of January 21 was correct as to attorneys' fees and the court there correctly applied the law as declared by the United States Supreme Court in *Sprague v. Ticonic National Bank,* 307 U.S. 161. That case is squarely in point.

Briefly the facts in that case were as follows: Petitioner had sued the Receiver of the Bank to impress on the proceeds of certain bonds a lien for a trust deposit. There were other similar trust deposits but the owners of these were not made parties to the suit and took no part therein. Mrs. Sprague was successful in her suit (303 U.S. 406), and when it was concluded, she then petitioned the District Court for an order allowing her reasonable counsel fees and expenses to be deducted from the share of the proceeds

of the bonds, and which had become payable to them as a result of her litigation.

The District Court held that it was foreclosed from granting petitioner's prayer, because in her litigation to establish her own claim, she had not mentioned any claim for attorneys' fees and expenses, and that the court could do nothing except follow the judgment on the mandate of the Appellate Court (303 U.S. 406). This, of course, had no reference to any trust funds except petitioner's and no reference to attorneys' fees. The U.S. Court of Appeals for the First Circuit (99 Fed.2d 583) affirmed the District Court.

The Supreme Court on certiorari reversed the District Court and the Court of Appeals and held that attorneys' fees and expenses could be recovered from the other beneficiaries even though the suit was not a class action.

We think we have a stronger case here, for this is a class action. No claimant would have received anything but for the efforts and expenditures of plaintiff and intervenor. We asked for costs and attorneys' fees in the complaints (pp. 14-15-17 printed record, Cause 14,505).

It is also interesting to note that in the *Sprague* case the court allowed interest (303 U.S. 405).

In the opinion of March 14 (R. 28-33) and in the final judgment of March 19 (R. 34-36) the District Court felt that its first opinion was wrong and could not be made the basis for a judgment for attorneys' fees to be paid out of claimants' benefits because of

the language of Sec. 763, Ch. 5, Ex. Session Laws 1955; Sec. 51-5-15(c), A.C.L.A. 1949, which reads:

> "Sec. 763. *Exemption of Benefits.* Any assignment, pledge, or encumbrance of any rights to benefits which are or may become due and payable under this Act shall be void; and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debt; and benefits received, by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts, except debts incurred for necessaries furnished to such individual or his spouse or dependents during the time when such individual was unemployed. Any waiver of any exemption provided for in this section shall be void."

This section is somewhat ambiguous. First it flatly prohibits assignment of claims. Next it prohibits attachment for debts. Then it excepts debts incurred for "necessaries during the time when such individual is unemployed". A claimant, then, could not assign any claim even in payment of a debt for necessaries, but the creditor is free to attach it. This does not seem to make sense.

In order to give this statute any practical effect, must we not interpret it to mean simply that a claim may neither be assigned nor attached, except to pay a debt for necessaries?

The word "necessary" has a flexible meaning. The United States District Court, for the Southern Dis-

trict of California, Central Division, in *Walling v. Thompson, et al.,* 65 Fed.Supp. 686, 688, quoting from *Roland Electrical Co. v. Walling,* 146 Fed.2d 745, says that the test of what is necessary is not "indispensibility but actual use".

As in the *Sprague* case, *supra,* there was no assignment of the claims in this case, although the claimants are not resisting payment of attorneys' fees.

Does the work, expense paid, and risk assumed in establishing these claims, which were denied by appellee, establish a *debt* by claimants and intervenor within the meaning of Sec. 763; a debt so sacred and inviolable that not only is an assignment prohibited and an attachment and garnishment enjoined, but a debt which a court of equity is powerless to order extinguished?

Appellants maintain that upon the record here the attorneys' fees and expenditures do not constitute a debt incurred by claimants within the meaning of the first part of Sec. 763; a debt which could neither be assigned, attached nor ordered by a court of equity to be paid.

The legal services and expenditures, if it can be said that they established a debt at all, were surely within the exception, and were debts for "necessaries". They were necessaries of the highest order. Until the conclusion of the litigation there were no claims "due", or "to become due" within the meaning of Sec. 763. They would never have "become due" but for the action of plaintiff and intervenor and their attorneys.

The allowance of the 3% does not reduce the amount of any claim. But for this action there would have been no claims.

If the 3% of the claims allowed as attorneys' fees in the court's opinion of January 21 could be considered a debt within the meaning of Sec. 763 as appellee contends, it seems clear that it was a debt for "necessaries". It was first *necessary* to claimants to establish their claims, before they could incur any debt against them for such *necessaries* as food and clothing. We do not think, however, that Sec. 763 has any application in this case.

Appellee says, in effect: "Plaintiff and intervenor could, during the past four years, have furnished claimants half a million dollars worth of food, shelter, clothing, medical service, etc., and their accounts could all have been recognized and paid, either by assignment or attachment, but they cannot recover even the very modest amount of a few thousand dollars necessary to establish the more than half a million dollars in claims." In order to prevail in any such argument, they must reason that the litigation was not necessary. This would seem to be absurd since the appellee has resisted the claims until the highest court in the land has spoken.

(B) Attorneys' Fees May Be Allowed From Commission's Administrative Fund.

Without waiving any part of our argument that attorneys' fees and expenditures may be ordered to be paid out of the fund established by this litigation

under the salvage doctrine as in the case of *Sprague v. Ticonic National Bank, supra,* we insist that, as we respectfully argued to the District Court, these fees may be paid out of the Administrative fund of the Commission. There seems to be clear provision for this in the statutes hereinafter set forth.

The Employment Security funds contributed by employers are divided into two parts; one of which is used to pay benefit claims, and the other to pay costs and expenses of administration. We have been heretofore dealing in Section (A) of this argument, with payment out of the benefits received or to be received by claimants as a result of this action. If, for any reason (and there appears to be none), the fees are not allowed pursuant to the trial court's opinion of January 21 under the salvage doctrine, they may be allowed as a matter of law, under the provisions of Sections 762 and 814, Ch. 5, Ex. Session Laws, Alaska 1955.

These sections read:

> "*Section 762.* Limitation of Fees. No individual claiming benefits shall be charged fees of any kind in any proceeding under this Act by the Commission or its representatives, or by any court or any officer thereof. Any individual claiming benefits in any proceeding before the Commission or its representatives or a court may be represented by counsel or other duly authorized agent; but no such counsel or agent shall either charge or receive for such services more than an amount approved by the Commission *or the Court.* Any person who violates any provision of this section shall, upon conviction thereof, for each

offense, be fined not more than $500.00, or imprisoned for not more than six months, or both." (Emphasis supplied.)

"*Section 814.* Fees of Attorneys for Claimants on Appeals to Courts. An attorney at law representing a claimant on appeal to the courts shall be entitled to reasonable counsel fees as fixed by the court not to exceed $300 and necessary court costs and printing disbursements not exceeding $150. In difficult cases the court to which the appeal was taken may, upon application of counsel for the claimant, increase such fees, court costs, or disbursements to an amount which the court deem reasonable. Such counsel fees, costs, and disbursements shall be paid by the commission out of employment security administration funds in each of the following cases: (a) any court appeal from an administrative or judicial decision favorable in whole or in part to the claimant, (b) any court appeal by a claimant from a Commission decision which reverses a tribunal decision in his favor, (c) *any court appeal as a result of which the claimant is awarded benefits,* or (d) any court appeal by a claimant from a decision by a tribunal, commission, or court which was not unanimous." (Emphasis ours.)

In the prayer of the complaint and the complaint in intervention we asked for attorneys' fees and costs without specifying how these should be paid (R. 14, 15, 17, printed record in Cause No. 14,505). We waited until the conclusion of the litigation, and again in our application for proposed judgment reinstating the mandate, we did not specify (R. 9-11). These fees are

to be paid in cases concerned with benefits to claimants.

The lower court passed on the applicability of one of these statutes in the second opinion, that of March 14, 1957, namely, Sec. 762, and held on page 2 of that opinion (R. 29) that fees referred to in that section applied only to appeals of individuals "from the decisions of the Commission", and that the plaintiff "could not be considered as a claimant within the meaning of the statute".

Although we did not ask the Commission before suit was brought to set aside the void regulation, and therefore strictly speaking did not appeal to the court from any decision of the Commission in that respect, it is apparent from the record that the Commission did not consider the Regulation in question to be void and ordered resistance to all claims through four years. They had no intention of paying the claims if Regulation No. 10 was upheld (see testimony of Director Phillips, p. 190 printed record in No. 14,505).

It was surely an appeal from the Commission's decision although brought directly as an injunction suit.

The trial court was right on March 14 in stating that "Fidalgo Island Packing Co. cannot be considered as a claimant". That is true. It did not claim benefits; but what of intervenor and the 2350 claimants on whose behalf both she and the plaintiff sued? They are the claimants.

And what about Sec. 814, Ch. 5, providing for fees for "a claimant on appeal to the courts" in cases,

among others, described in clause (c) of that section as "any court appeal as a result of which the claimant is awarded benefits"?

The trial court did not mention this statute at all. Surely if none of the other statutes hereinabove mentioned, or the salvage doctrine as applied in the opinion of the Supreme Court in the *Sprague* case, *supra*, sanction the allowance of the attorneys' fees in this case, Sec. 814, Ch. 5, Ex. Session 1955 requires it. The statute says "a claimant on appeal to the courts, *shall be entitled to reasonable counsel fees as fixed by the court. . . .*" This is not a case where we question the discretion of the court as to the amount of the fees, and ask this Court to interfere. The trial court, in its opinion of January 21 said 3% of the total claims was reasonable; but in its opinion of March 14, it concluded, on rehearing, that the court had no power to award anything.

The result therefore is that the trial court in effect followed the opinion of the District Court of Maine in *Sprague v. Picher, Receiver,* 23 Fed.Supp. 59, and not the opinion of the United States Supreme Court reversing it in *Sprague v. Ticonic National Bank etc.* 307 U.S. 161.

---

(3) APPELLEE HAS NO INTEREST AND IS NOT CONCERNED IN ALLOWANCE OF ATTORNEYS' FEES UNDER THE SALVAGE DOCTRINE.

The mandate in this case makes it now necessary for appellee and the Commission to pay the claims in full. Whether they pay the whole amount to the

2350 claimants, or part to them and part for necessaries furnished them, including necessary services in establishing the claims after long and expensive litigation, would appear to be no concern of theirs. It is a matter between claimants and plaintiff and intervenor. It would seem that the application of the salvage doctrine would be an advantage to appellee, for if that doctrine is not applied, then the statutes, Secs. 762 and 814, Ch. 5, Ex. Session 1955, make it quite clear that attorneys' fees and expenses may be assessed against the administrative fund of the Commission.

---

(4) PAYMENT OF FEES FROM INTEREST.

If the court should, for any reason, deem it inequitable to allow these fees under the salvage doctrine and that the statutes cited are not applicable, we think it may not be amiss to suggest that they may be allowed as a deduction from the interest which we think is payable to claimants. We think the fees are allowable, either against the claims themselves or under the statutes. This case is before a court of equity, and if there is no way to provide for fees and costs in this type of litigation, the practical effect will be to leave claimants outside the protection of that maxim upon which we have heretofore relied and which teaches us that "equity will not suffer a wrong to be without a remedy".

In such cases no claimant, or group of claimants, to unemployment benefits, could afford to attack the most flagrant regulation of the Commission depriving them of their rights.

No attorney could afford to undertake the prosecution of a case of this nature, if he could not take assignments in advance, but must speculate on reimbursement of his expenditures and payment of his fees by seeking out the thousands in the class to be benefited, at the conclusion of the litigation, and presenting them with his charges and seeking pro rata payment.

We hesitate to cite to this Court cases which have long since established the principle that equity has jurisdiction of a cause unless the remedy at law is as certain, complete, prompt and efficient as the remedy in equity. The principle is stated by the United States Court of Appeals for the Ninth Circuit in the case of *Lake Charles Rice Mill. Co. v. Pacific Rice Growers' Ass'n.*, 295 Fed. 246 at 249, as follow quoting from *Boyce v. Grundy,* 7 Law. Ed. 655:

> "It is not enough, that there is a remedy at law it must be plain and adequate, or, in other words as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity."
>
> "These cases and the numerous similar decision in other jurisdictions are applications of the principle that, even where a legal right is invaded equity will grant such relief as is appropriate and necessary, if damages, the only relief possible in an action at law, are wholly inadequate to do justice between the parties. Pomeroy, Equity Jurisprudence (4th Ed.). The trial court did not err in holding that the plaintiffs were entitled to this relief." *Caramini v. Tegulias,* 112 A.L.R. ....., 12 Conn. 548, 186 A. 482 at 484.

Courts of equity are established and have existed and functioned, as a matter of necessity, from ancient times, under long established rules, for the very purpose of granting relief where it is denied by the law through reason of its universality, inadequacy, or delay.

Pomeroy in discussing the maxim that Equity follows the law says:

> "The maxim is, in truth, operative only within a very narrow range; to raise it to the position of a general principle would be a palpable error. Throughout the great mass of its jurisprudence, equity, instead of following the law, either ignores or openly disregards and opposes the law. As was shown in the introductory chapter which deals with the nature of equity, one large division of the equity jurisprudence lies completely outside the law; it is additional to the law; and while it leaves the law concerning the same subject matter in full force and efficacy, its doctrines and rules are constructed without any reference to the corresponding doctrines and rules of the law."
>
> "Another division of equity jurisprudence is directly opposed to the law which applies to the same subject matter; its doctrines and rules are so contrary to those of the law, that when they are put into operation the analogous legal doctrines and rules are displaced and nullified. As these conclusions cannot be questioned, it is plain that the maxim, Equity follows the law, is very partial and limited in its application, and cannot, like all the other maxims discussed in this chapter, be regarded as a general principle." Pomeroy's Equity Jurisprudence, Third Edition, Sec. 427, Fourth Ed. same.

"While the maxim that 'Equity follows the law' has been frequently stated and applied, it does not always apply, and does not, of course, apply in those matters which entitle a party to equitable relief, although the strict rule of law is to the contrary." 30 C.J.S. p. 503.

CONCLUSION.

We respectfully request that the judgment on the mandate entered by the District Court on March 19, 1957, be reversed as to disallowance of interest and attorneys' fees and expenses; and that this case should be remanded with instructions to the trial court to include interest on the claims at 6% per annum from the due dates thereof and an attorneys' fee to attorneys for plaintiff and intervenor as found to be reasonable, in the trial court's opinion of January 21, 1957, plus a reasonable fee for services in the proceedings since January 21 in both the District Court and this Court, together with the costs and disbursements of this appeal.

Dated, Juneau, Alaska,
May 6, 1957.

Respectfully submitted,
FAULKNER, BANFIELD & BOOCHEVER,
JOHN H. DIMOND,
H. L. FAULKNER,
Attorneys for Appellants.

(Appendix Follows.)

Appendix.

Appendix

PORTIONS OF FEDERAL RULES APPLICABLE.

Rule 54(d):

"Except when express provision therefor is made, either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ."

Rule 58:

" . . . The entry of the judgment shall not be delayed for the taxing of costs."

PORTIONS OF RULE OF DISTRICT COURT APPLICABLE.

Rule 25:

(1) "Unless the court, in its discretion, otherwise directs, the following schedule of attorneys fees will be adhered to in fixing such fees for the prevailing party *as a part of the costs of the action allowed by law.*"

(2) (Here follows schedule)

(3) "In all other cases where the above schedule shall not be applicable, the court shall fix such fees in favor of the prevailing party as shall appear just and reasonable."